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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWIN CASEROS,

Defendant and Appellant.

B302110

(Los Angeles County
Super. Ct. No. BA318905)

APPEAL from an order of the Superior Court of Los Angeles County. Charlaine F. Olmedo, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Charles S. Lee and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant and appellant Edwin Caseros appeals from the denial of his petition for resentencing pursuant to Penal Code section 1170.95. We affirm.

In 2010, a jury found defendant, and three codefendant accomplices, guilty of the first degree murder of their fifth accomplice on the theory of provocative act murder, and the jury found true a gang-murder special circumstance allegation. Under the theory of provocative act murder, the perpetrator of an underlying crime is held liable for the killing of an accomplice by a third party. (*People v. Cervantes* (2001) 26 Cal.4th 860, 867.) The jury also found defendant and his accomplices guilty of premeditated attempted murder, attempted residential burglary and shooting at an inhabited dwelling and found true gang and firearm use allegations. Defendant was sentenced to life without the possibility of parole, plus 62 years.

In 2012, this court, in a published decision, struck and reduced certain statutory fines and fees imposed as part of the sentence, but otherwise affirmed defendant's conviction in its entirety. (*People v. Mejia* (2012) 211 Cal.App.4th 586 (*Mejia*)). We also affirmed the convictions of his three accomplices.

This is the evidence we found supported defendant's conviction. Defendant admitted to the girlfriend of his murdered accomplice that codefendant Adam Perez drove him and codefendants Carlos Hernandez and Jesus Lorenzo to a rival gang member's apartment to "attack" him. "They went to the front door, called out his name, and told him to come out. When he did not come out, they went to an alley to climb up a wall. [Defendant] saw that the rival had a gun, but Lorenzo did not care and tried to climb in the window. When Lorenzo got to the window, the rival gang member shot him in the chest. [Defendant] and Hernandez then tried to drag Lorenzo away, but

the rival then shot [defendant]. Both [defendant] and Hernandez then ran away.” (*Mejia, supra*, 211 Cal.App.4th at p. 600.) Apart from his admissions, defendant was arrested near the crime scene shortly after the shooting, and he had shotgun wounds to his shoulder and bicep. (*Id.* at p. 598.) Additional evidence established that defendant, like the other codefendants, was a member of the 18th Street gang and thus had a motive to kill the rival gang member. (*Id.* at pp. 596-597, 601.) Codefendant Josue Manuel Mejia was also arrested near the crime scene shortly after the shooting, in possession of the gun he used to shoot at the rival gang member’s apartment after the murder of Lorenzo. (*Id.* at pp. 598, 600-601.)

In March 2019, defendant filed a petition for resentencing pursuant to Penal Code section 1170.95, a new statute that became effective January 1, 2019. Defendant’s petition alleged he was not the actual killer, was not a major participant, and he had been convicted pursuant to the felony murder rule or the natural and probable consequences doctrine. The petition also requested appointment of counsel.

The trial court appointed defendant counsel and granted the district attorney’s office’s request for an extension of time to file an opposition. After full briefing and a hearing, the court denied defendant’s petition, finding defendant had failed to demonstrate a prima facie case warranting issuance of an order to show cause and an evidentiary hearing.

This appeal followed.

Defendant contends the trial court erred in denying his petition without conducting a full evidentiary hearing within the meaning of the statutory scheme. We disagree.

Penal Code section 1170.95 was enacted as part of the legislative changes effected by Senate Bill 1437 (2017-2018 Reg. Sess.). “Senate Bill 1437 was enacted to ‘amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.’ (Stats. 2018, ch. 1015, § 1, subd. (f).)” (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

Penal Code section 1170.95, subdivision (a) provides, in plain language, that only persons “convicted of felony murder or murder under a natural and probable consequences theory” may file a petition seeking resentencing. Nothing in the statutory language provides that persons, like defendant, convicted on a theory of provocative act murder are eligible to apply for relief. We agree with our colleagues in Division One that relief under section 1170.95 is not available because liability for provocative act murder “requires proof of malice, which distinguishes it from felony murder and natural and probable consequences murder.” (*People v. Lee* (2020) 49 Cal.App.5th 254, 258.)

Defendant concedes that provocative act murder liability requires proof of malice aforethought but argues the jury was also instructed on felony murder and the natural and probable consequences doctrine and it is not possible to determine under which theory he was found guilty, such that he is entitled to an evidentiary hearing to demonstrate his entitlement to resentencing relief. This incorrect contention directly contradicts the law of the case as established in our opinion affirming defendant’s conviction.

In our prior opinion, we found the jury convicted defendant and his codefendants of first degree provocative act murder. We found the jury instructions accurately defined the state of mind required of each defendant for a finding of first degree provocative act murder. The court instructed the jury that each defendant must have *individually* acted willfully, deliberately, and with premeditation before he could be convicted of first degree murder. “[T]he evidence was overwhelming that the attack on [the rival gang member] began as a planned attempt to kill him and that each [defendant] intentionally participated in that attack.” (*Mejia, supra*, 211 Cal.App.4th at p. 618.)

We found any error in instructing the jury on felony murder was harmless beyond a reasonable doubt because the jury was instructed it had to find each defendant not only acted with express malice but that the requisite intent was formed prior to the attempted entry through the window. “By definition, such an instruction necessarily includes a finding of premeditation and deliberation.” (*Mejia, supra*, 211 Cal.App.4th at p. 621.) “Additionally, . . . the evidence was overwhelming that each [defendant] arrived at the scene that night for the purpose of killing or assisting in the killing of [the rival gang member]. . . . Given this record, there is simply no rational way to view such evidence except as establishing, beyond a reasonable doubt, express malice, premeditation, and deliberation.” (*Ibid.*)

We found the court erred by instructing the jury on natural and probable consequences of the attempted murder or attempted burglary but the error did not warrant reversal because the jury must have disregarded the instruction since it plainly did not apply to the facts of this case. We reasoned that defendant and his codefendants could not be liable for aiding and abetting

Lorenzo's murder because Lorenzo could not be guilty of his own murder, so they could not aid and abet him; nor could they aid and abet the rival gang member who killed Lorenzo because he was not a principal in the accomplices' crimes and his use of force was justified. (*Mejia, supra*, 211 Cal.App.4th at pp. 627-628.)

Since we held in our prior opinion that defendant was convicted of first degree provocative act murder, and the jury could not have convicted him of felony murder or natural and probable consequences murder, defendant cannot establish a prima facie case for resentencing relief. The trial court did not err in denying his petition.

DISPOSITION

The order denying the petition for resentencing is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

WILEY, J.